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No. 442

In the Supreme Court of the United States

OCTOBER TERM, 1940

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXPRESS PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXPRESS PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on May 7, 1940, insofar as that decree set aside and refused to enforce, or modified, an order of the Board issued against respondent.

OPINIONS BELOW

The opinion of the circuit court of appeals (R. I, 85–87) is reported in 111 F. (2d) 588. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 52–73) are reported in 13 N. L. R. B. 1213.

JURISDICTION

The decree of the circuit court of appeals (R. I, 87–88) was entered on May 7, 1940. A petition for rehearing filed by the Board (R. I, 88–95) was denied on June 17, 1940 (R. I, 96). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon findings that an employer has refused to bargain collectively with the authorized representative of its employees in an appropriate unit, the Board may validly order the employer to cease and desist from such refusal to bargain, in addition to affirmatively requiring the employer to bargain collectively.

2. Whether a refusal to bargain collectively in violation of Section 8 (5) of the Act likewise constitutes an interference with the employees' exercise of their rights to self-organization and to bargain collectively through representatives of their own choosing, in violation of Section 8 (1) of the Act.

3. Whether, upon findings that an employer has refused to bargain collectively with the authorized representative of its employees in an appropriate unit, the Board may validly order the employer to

post in its plant appropriate notices to its employees stating its intention to comply with the Board's order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

Upon the usual proceedings,[1] the Board issued its findings of fact, conclusions of law, and order (R. I, 52–73). Omitting jurisdictional findings, as to which no question is raised, the facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

The respondent company publishes two newspapers at St. Antonio, Texas (R. I, 54–55; R. III, 1–4). It is stipulated that the employees working in the editorial departments of both newspapers

[1] These, pursuant to Section 10 of the National Labor Relations Act, were: amended charge (R. I, 8–10), complaint (R. I, 10–15), answer (R. I, 16–22), hearing before a trial examiner (R. II, 1–69), filing of a brief by respondent with the trial examiner (R. I, 26), intermediate report of the trial examiner (R. I, 25–40), exceptions thereto by respondent (R. I, 41–49), and oral argument before the Board (R. I, 51).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence or stipulation of the parties.

constitute an appropriate unit for purposes of collective bargaining, and that at all times relevant herein the San Antonio Newspaper Guild was the exclusive bargaining representative of a majority of the employees in such unit (R. I, 56–57, 70–71; R. III, 5). On four occasions during the months of March, April, and May, 1938, the company met with representatives of the Guild for the ostensible purpose of bargaining collectively (R. I, 57–66; R. III, 14–22, 23–49, 62–103, 107–124). However, the company rejected each of the Guild's proposals on the bare ground that it was "unreasonable," or "unacceptable," or "unwarranted," or "impracticable" (R. I, 59–61, 64–65, 67; R. III, 25–26, 34, 114–115, 117–118, 122). The company would not specify in what respects the proposals were unacceptable or what changes would make them acceptable, and refused to submit any counterproposals, although requested by the Guild to do so (R. I, 61, 65–66, 67; R. III, 34–37, 84–85, 115). The Board found that the company's technique "was calculated to and did make any productive negotiations impossible" and that the company at no time had any intention of negotiating in good faith with the Guild or of entering into a collective agreement with it (R. I, 66–67). The Board concluded, accordingly, that the company had refused to bargain collectively in violation of Section 8 (5) and had thereby interfered with the employees' exercise of the rights guaranteed in Section 7 of the Act (R. I, 69, 71).

The Board further found that on April 4, 1938, during the negotiations mentioned above, Hall, secretary of the company, assembled the editorial employees and read to them a prepared statement, which, the Board concluded, amounted to an interference with the Guild's efforts to negotiate, and constituted a further violation of Section 8 (1) (R. I, 67–68, 71).

Upon these findings, the Board ordered the company to cease and desist (a) from refusing to bargain collectively with the Guild; and (b) from interfering with the exercise by its employees of the rights guaranteed in Section 7 of the Act. As affirmative action, the Board ordered the company (a) upon request, to bargain collectively with the Guild as the exclusive representative of its editorial employees, and, if an understanding were reached, to embody the understanding in a signed agreement if so requested by the Guild; (b) to post and maintain in conspicuous places within the plant notices to the employees stating that the company would cease and desist as required by the order and would bargain collectively with the Guild; and (c) to notify the Board's Regional Director concerning what steps the company had taken to comply with the order (R. I., 71–73).

On January 22, 1940, the Board filed in the court below a petition for enforcement of its order against the company. On May 7, 1940, the court handed down its opinion holding that the Board had validly found a refusal to bargain collectively,

but that the statement read to the employees did not violate Section 8 (1) (R. I, 85–87).[3] On the same day, the court entered a decree enforcing the provision of the Board's order requiring the company, as affirmative action, to bargain collectively with the Guild upon request, and the provision requiring notification to the Regional Director concerning steps taken to comply with the order. But the court denied enforcement to the entire cease and desist order, and it substituted for the requirement that notices be posted in the plant a provision ordering the company merely to notify the Guild of its willingness to comply with the order (R. I, 87–88). On June 17, 1940, the court denied, without opinion, a petition for rehearing filed by the Board (R. I, 96).[4]

[3] While we think the court's holding that the statement did not violate the Act is erroneous, we do not seek review of its decision in that respect, since it turns on facts peculiar to this case and since, in the view we take, the refusal to bargain is sufficient alone to support the Board's order in its entirety.

[4] In its petition for rehearing the Board urged, *inter alia*, (a) that a violation of Section 8 (5) having been found by the Board and its finding having been sustained by the court, the order requiring the company to cease and desist from its refusal to bargain was mandatory under Section 10 (c) of the Act and under the decisions of this Court; (b) that a refusal to bargain has been consistently held to violate Section 8 (1) as well as Section 8 (5), by the court below and the other circuit courts of appeals, and that the order requiring the company to cease and desist from interfering with the rights of its employees was therefore likewise mandatory; and (c) that the provision requiring notices to be posted was

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In refusing to enforce the cease and desist rovisions of the Board's order.

2. In failing to hold that a refusal to bargain llectively in violation of Section 8 (5) of the Act kewise constitutes an interference with the emloyees' exercise of the rights guaranteed in Secon 7 of the Act, thereby violating Section 8 (1) the Act.

3. In refusing to enforce the provision of the oard's order requiring the company to post in its lants notices to its employees that it will comply ith the Board's order, and in substituting for that rovision a requirement that the company notify he Guild of its willingness to comply.

4. In refusing to enforce the order of the Board full.

REASONS FOR GRANTING THE WRIT

1. Although the court below approved the oard's finding that the company refused to bar-

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lid under the decisions of this Court and of the court low and the other circuit courts of appeals. Finally, the tention of the court was called to the opinion of this Court *National Labor Relations Board* v. *Bradford Dyeing ss'n*, No. 588, last Term, decided May 20, 1940, wherein this ourt stated that where a fair hearing has been had, the ndings of unfair labor practices are supported by substanal evidence, and the remedy ordered is appropriate, "obeence to the statutory law on the part of the Court of ppeals requires the court to grant enforcement of the oard's order" (R. 88–95).

gain collectively with the authorized representative of its employees, in violation of Section 8 (5) of the Act, and although the court enforced the Board's affirmative bargaining order based on this finding, it refused, without explanation, to enforce the corresponding cease and desist provision of the Board's order. The Board having found a violation of Section 8 (5), the cease and desist order was mandatory upon it under Section 10 (c) of the Act. See *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. The failure of the court below to enforce the cease and desist provision is contrary to the plain terms of the Act and departs from the uniformly settled practice under it. No other court has ever, while sustaining a finding of a violation of the Act, refused to enforce an order to cease and desist from the violation.[5]

2. The court's failure to hold that a refusal to bargain collectively in violation of Section 8 (5) of the Act likewise violates Section 8 (1), and its consequent refusal to enforce the provision of the

[5] In one prior case the court below, likewise without explanation in its opinion, denied enforcement to the cease and desist provisions of the Board's order although it upheld the finding of a refusal to bargain in violation of Section 8 (5) and enforced the affirmative bargaining order. *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91 (C. C. A. 5th). But in all of its many other decisions under the Act the court, if it approved the Board's findings of unfair labor practices, enforced the cease and desist orders based thereon.

order requiring the company to cease and desist from interfering with the employees' exercise of the rights guaranteed by Section 7, is in conflict with numerous decisions of other circuit courts of appeals. *Art Metals Construction Co.* v. *National Labor Relations Board,* 110 F. (2d) 148, 150–151 (C. C. A. 2d), overruling in this respect *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 869 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Griswold Mfg. Co.,* 106 F. (2d) 713, 715–716 (C. C. A. 3d); *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. (2d) 632, 639 (C. C. A. 4th); *Hartsell Mills Co.* v. *National Labor Relations Board,* 111 F. (2d) 291, 292 (C. C. A. 4th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18, 22–23 (C. C. A. 9th).[6]

[6] These decisions, holding that a refusal to bargain collectively within the meaning of Section 8 (5) likewise interferes with, restrains, and coerces the employees in violation of Section 8 (1) are supported by the legislative history of the Act. In its report on the bill which became the National Labor Relations Act, the Committee on Labor of the House of Representatives said (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 17):

"The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1)."

See also Senate Report No. 573, 74th Cong., 1st Sess., p. 9.

3. The court's refusal to require the company to post any notices directed to its employees is likewise a departure from the settled practice in all of the circuit courts of appeals and in this Court.[7] The Board's authority to require the posting of appropriate notices directed to the employees is now settled. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 462–463; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, No. 588, last Term, decided May 20, 1940. Instead of enforcing this valid provision, the court below, exercising the Board's "judgment and discretion * * * in choosing the particular affirmative re-

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[7] While the circuit courts of appeals have differed concerning the form of notice which may be required, all of them have agreed that some form of notice directed to the employees may be ordered, and in cases where the particular form was disapproved the notices were not eliminated but modified.

The legislative history of the Act expressly mentions the "posting of appropriate bulletins" as affirmative action which the Board may order. House Report No. 1147, 74th Cong., 1st Sess., p. 24.

Prior to its decision in the present case the court below uniformly enforced provisions requiring notices directed to the employees to be posted by the employer. *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497; *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 871–872; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474; *National Labor Relations Board* v. *Lane Cotton Mills Co.*, 111 F. (2d) 814.

lief to be ordered" (the *Pennsylvania Greyhound* case, *supra,* at p. 265), framed a provision which omits all notification to the employees, and thus falls "far short of conveying 'to the employees the knowledge of a guarantee of an unhampered right in the future to determine their labor affiliations.'" The *Falk* case, *supra,* at 463.[8]

CONCLUSION

The decision of the court below, in refusing enforcement, without explanation, to provisions of the Board's order which are of established validity, departs from proper judicial procedure in respects which are important to the uniform enforcement of the Act. Compare *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* No. 588, last Term, decided May 20, 1940. For these reasons we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1940.

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[8] In *H. J. Heinz Co.* v. *National Labor Relations Board,* 110 F. (2d) 843 (C. C. A. 6th), certiorari granted June 3, 1940, No. 73, present Term, the court said (at p. 849):

The employees' need of assurance probably always justifies an order to the employer to post notices that he will bargain collectively with a particular union, etc. * * *

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.
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> * * * * *

SEC. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive * * *.

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